UNITED NATIONS

ECONOMIC AND SOCIAL COUNCIL

Distr.
GENERAL

E/CN.15/1995/7/Add.1
26 April 1995

ORIGINAL: ENGLISH

COMMISSION ON CRIME PREVENTION
AND CRIMINAL JUSTICE
Fourth session
Vienna, 30 May-9 June 1995
Item 6 of the provisional agenda*

UNITED NATIONS STANDARDS AND NORMS IN THE FIELD OF CRIME PREVENTION AND CRIMINAL JUSTICE

Report of the Secretary-General

Addendum

Development of United Nations minimum rules for the administration of criminal justice

Summary

On the recommendation of the Commission on Crime Prevention and Criminal Justice at its third session, the Economic and Social Council, in its resolution 1994/17, requested the Secretariat to seek comments from all Member States and from other appropriate sources on the desirability of preparing and adopting United Nations minimum rules in the field covered by the draft minimum rules prepared by an expert commission. The Secretariat, by 25 April 1995, had received replies from 27 Member States. In addition, five interregional and regional institutes had submitted comments. The replies received reflect the diversity of views expressed on this subject.

*E/CN.15/1995/1.

V.95-53409T

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INTRODUCTION

1. The Economic and Social Council, in its resolution 1994/17 of 25 July 1994, decided to note the draft minimum rules for the administration of criminal justice, prepared by an expert commission that held four working sessions at Palma de Mallorca, Spain, from 23 to 25 November 1990, from 3 to 5 May 1991, from 5 to 8 September 1991 and from 14 to 16 February 1992, at the invitation of the advisory board to the Presidency of the Balearic Autonomous Community and with the cooperation of the Crime Prevention and Criminal Justice Branch of the Secretariat. The draft text was attached to a note verbale from the Permanent Mission of Argentina to the United Nations Office at Vienna (E/CN.15/1994/11).

2. In the same resolution, the Council requested the Secretary-General to seek comments from all Member States and from other appropriate sources on the desirability of preparing and adopting United Nations minimum rules in the field covered by the draft minimum rules prepared by the expert commission, and to submit a report to the Commission on Crime Prevention and Criminal Justice at its fourth session. The Commission was requested to follow up this matter at its fourth session.

3. Pursuant to the above-mentioned mandate, the Secretary-General, in October 1994, addressed a note verbale to Governments, inviting them to submit observations and comments. A similar request was addressed by the Crime Prevention and Criminal Justice Branch to 49 relevant institutions, including the institutes that comprise the United Nations crime prevention and criminal justice programme network, as well as intergovernmental and non-governmental organizations.

4. By 25 April 1995, replies had been received from the following States: Argentina, Austria, Bahrain, Belarus, Canada, Colombia, Cuba, Cyprus, Denmark, Ecuador, Finland, Germany, Ghana, Japan, Jordan, Kazakhstan, Kuwait, Luxembourg, Namibia, New Zealand, Oman, Panama, Peru, Switzerland, Syrian Arab Republic, Turkey and United Kingdom of Great Britain and Northern Ireland.

5. Replies had also been received from the following institutions: United Nations Interregional Crime and Justice Research Institute (UNICRI), Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, European Institute for Crime Prevention and Control, affiliated with the United Nations, the Arab Security Studies and Training Centre (ASSTC), the International Centre for Criminal Law Reform and Criminal Justice Policy and the International Federation of Business and Professional Women.

6. In view of the length of some replies, not all of them could be fully reflected in the present report. Thus, in several instances, summaries or excerpts of the essential parts had to be made. Copies of the original replies are with the Secretariat.

I. COMMENTS RECEIVED FROM STATES

A. Argentina*

7. Argentina considers the discussion and adoption of the draft minimum rules for the administration of criminal justice to be a matter deserving high priority. It is in the administration of criminal justice that decisions are taken affecting the freedom of citizens, the protection of the community against crime

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*Reply, in original Spanish, received on 3 February 1995.

and the authority of the norms and values that make democratic life possible. As the preamble to the draft very rightly says, the aim is, proceeding from recognized basic rights, to harmonize the requirement of efficient criminal justice with effective consideration for the guarantee of persons whose rights are affected by criminal proceedings.

8. In the effort to maintain this delicate balance, so difficult to achieve, these draft rules represent an exemplary and durable synthesis. If they are adopted by the international community, they will fill a gap as regards the practical functioning of the administration of criminal justice, both in the developing and developed countries. In short, we have in the draft a set of rules whose central core is the protection of fundamental rights, and which shows the way to a new humanism in criminal law and criminal policy for the twenty-first century.

B. Austria*

9. Austria supports the elaboration of minimum rules of the United Nations for the administration of criminal justice and welcomes the existing draft. The draft can be seen to be sufficiently developed, so that it is conceivable to submit it directly to the Commission on Crime Prevention and Criminal Justice where it could be finalized, possibly in the framework of an in-sessional working group.

10. In substance the draft strives to establish, at the level of the United Nations, progressive standards of criminal proceedings. In a few instances, however, it seems to reach too far, in particular as regards rules 7, 10, 11 (2), 12 (2), 12 (5), 20, 44 and 45. Discussions will be required which by way of compromise might result in limiting some of the principles.

11. The following comments were made concerning specific rules:

(a) With regard to rule 4 (1), it is not immediately obvious why not only "findings in criminal matters" but also "prosecutions" should always be the responsibility of independent judges. Such a rule, which Austria cannot support, would seem to be in contradiction to rules 1 (3), 2 and 3;

(b) With regard to rule 7, the principle espoused in the first phrase cannot be maintained without important exceptions. The purpose of certain measures (detention, house research and telephone surveillance) will often require that they are taken without a previous hearing (also compare rule 14 (2)).

C. Bahrain**

12. As regards rule 4 (1), the English and Arabic texts do not correspond. The term "prosecution" in the English text refers to a procedure, before a criminal court, the function of which is not assumed by independent judges in either the Latin or the Anglo-Saxon systems, and therefore the Arabic version is the more correct. Rule 4 (2) is imprecise, because the public prosecution is part of the structure of a criminal court. Incontestably, although it may have previously undertaken investigation of the case, this does not prevent it from representing the prosecution before the court. Similarly, a judge who hears orders for the detention of accused persons (preventive detention), as well as a judge who issues a ruling as a matter of form or jurisdiction, may hear it a second time if such a judgement is overturned by a court of appeal.

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*Reply, in original English, received on 3 February 1995.

**Reply, in original English and Arabic, received on 23 January 1995.

13. As regards rule 7, accused persons who are fugitives or who have escaped should be excepted from this rule, as measures affecting their rights, such as arrest orders and orders for the search of their dwelling places, may be taken without the precondition of a prior hearing.

14. As regards rule 22, preventive detention should be permissible even if the sanction for the offence is imprisonment for less than two years, if the accused person is likely to escape, or if he or she does not have a known domicile. This is in effect in many criminal laws. As regards rule 23 (2), the phrase "when there is no other way to detect the assumed offence" should be replaced with the phrase "when it is possible that it will produce useful evidence in the case". This is preferable to the phrase in the text of this rule, as bodily intervention may be important to proving the offence, even though it may not be the sole proof. The judiciary may permit it here, subject to the reservation that there is no risk to the health of the person concerned, and with maximum respect for the dignity of the person.

15. Rules 44 and 45 should be deleted, as the draft minimum rules are concerned with the establishment of criminal justice within each State, and are not concerned with matters within the competence of international courts. According to rule 1 (1) of the draft, prosecution for an offence shall be the sole competence of the States, in accordance with the law. Furthermore, these minimum rules are a guide aimed at benefiting States to assist them in amending their legislation to make it compatible with the minimum rules.

D. Belarus*

16. The draft pursues the aim of bringing together in one document the most important and fundamental propositions adopted in recent years relating to the United Nations standards and rules for the administration of criminal justice. Considering that the United Nations has adopted a considerable number of quite diverse standards and rules in the sphere of criminal justice, the present attempt at systematization deserves support and approval. In addition, the importance of the work already done should be stressed for the further reason that it represents a first step on the road to implementing the numerous proposals regarding the systematization of United Nations standards and rules, proposals which were aired during both the period of preparation and the work of the earlier congresses on the prevention of crime and the treatment of offenders.

17. From the viewpoint of form and content, the document submitted does not call for any observations of principle. It has been prepared in accordance with the International Bill of Human Rights, and reflects the main features of United Nations standards and rules for the administration of criminal justice, and is intended to protect the rights of the person which are liable to infringement in the course of legal proceedings. On the other hand, the draft does call for some modification in terms of both form and content.

18. While approving the structure of the draft as a whole, we would point out that it is not integrally sustained throughout. There is no specific section devoted to judicial organs. A section of the kind would appear to be essential. Unfortunately, the draft has not reflected certain important aspects of criminal justice which are regulated in international instruments. For, example, there is no section devoted to the passing of sentence and the basic principles by which the court should be guided in this connection.

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*Reply, in original Russian, received on 2 March 1995.

19. It is our belief that these amendments and additions will impart a clearer structure to the text of the draft, and the content of the rules will more closely conform to international standards and rules. Furthermore, in the proposed drafting the minimum rules will cover a wider range of topics, corresponding to established concepts regarding the role of the courts and the problems involved in their operation, and also regarding the protection of the rights of persons affected by the action of criminal justice.

E. Canada*

20. Having regard to the criminal justice system of Canada and of other common law countries that are based on an adversarial procedure of criminal justice, and taking into account the existing international norms and standards and the reasons for the establishment of the United Nations Commission on Crime Prevention and Criminal Justice, the adoption of the proposed draft would entail substantial conflict with the criminal justice procedure of common law systems and, in some situations, would be retrograde or inconsistent with the protection accorded by Canadian constitutionally entrenched rights; would overlap with existing internationally approved instruments in the field; and would not represent a desirable advancement in the context of the credibility of the United Nations crime prevention and criminal justice programme. A number of problems exist in the draft that do not take into account the various legal systems in the world and would be encountered by the common-law, and in particular the Canadian, criminal justice system.

21. Rules 1 (3), 2 and 3 seem to suggest that the judiciary should have some authority over the exercise of discretion as to whether or not the authorities initiate prosecutions. In the common-law system, police and prosecutors exercise their discretion on the basis of well-established principles which are not often set out in written instruments. Although they are part of the criminal justice system, each of them is independent of the other, and this independence has been jealously guarded and supported by the judiciary. Adoption of these articles would therefore violate the principles of independence and separation of powers between the executive and the judiciary.

22. Rule 11 is framed in terms that mandates the assistance of a lawyer in criminal proceedings entailing the deprivation of freedom. It excludes the possibility of an accused choosing not to be represented by a lawyer. An accused in common-law systems is given a right to be represented by counsel but cannot be forced to employ one. Furthermore, giving the accused the right to a lawyer does not necessarily entitle that person to counsel of choice, as provided in rule 19 (3), because the latter would impose an unacceptable burden in the legal aid system in many of countries which provide for a system of legal aid clinics.

23. The concept of preventive detention referred to in rule 20 is not necessarily the same in Canada. In Canada, a person must be charged with an offence before detention following an arrest can be extended beyond the maximum period of 24 hours. Except where there is a likelihood of committing further offences if released, or where it is necessary to ensure attendance in court, an accused has a right to be released on bail. Pretrial detention in Canada is not explicitly related to the likely punishment which varies within the permissible range of sentence provided in the penal code. Within this range, the court has a discretion on the length of the sentence it can impose.

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*Reply, in original English, received on 23 February 1995.

24. Rule 27 is inconsistent with the adversary system. While the accused has a right to have disclosed to him or her all material evidence which tends to negate his or her criminal liability, the parties (prosecution and defence) have the right to decide what evidence to introduce at the trial.

25. Expert witnesses under the adversary system are generally called by the parties in the trial (not the judge), and cannot be classed as necessarily impartial and independent. Rule 30 is thus inconsistent with the common-law adversarial system.

26. Rules 44 and 45 are premature and anticipate the creation of a permanent international criminal court by the General Assembly.

27. As noted in Economic and Social Council resolution 1994/17 of 25 July 1994, it has been suggested that the introduction of oral criminal procedure would make it possible to replace the investigative and inquisitorial procedure; nevertheless, there is no ideal model of how an adversarial process may operate. It would be more productive to emphasize the implementation of existing instruments where there is international consensus, despite the differences of legal systems in the world. Those countries which wish to change their criminal justice procedures to one of an adversarial system might find it more profitable to seek international cooperation and assistance with a number of States that utilize an adversarial legal system, rather than attempt to develop universal statements which do not accommodate the differences of the legal systems of the world.

F. Colombia*

28. The principles set out in rule 1 (2) do not constitute common minimum rules whose content is such that they can be applicable to prosecutorial, inquisitorial and mixed procedural systems. Colombia considers it necessary to formulate a principle that allows for the differences between these systems.

29. Rule 4 (2) distorts the principle of appeal, whereby any party to a suit is entitled to challenge the decisions of the judicial authority concerned. In the exercise of this right, decisions are reviewed by higher courts; this process being without prejudice to the continuation of the proceedings presided over by the officer who pronounced the lower-court decision. The wording as proposed would mean that, whenever a decision is overturned by a higher court, the lower court would not be able to continue to try the case, a fact that would constitute a clear element of delay in proceedings and obvious congestion of the judicial process.

30. Rule 4 (3) disregards differences between legal regimes and thus the possibility that the respective juridical systems may establish courts having special jurisdiction. The requirement stipulated here is unacceptable to Colombia. Special jurisdictions have to be recognized in all countries' constitutional charters, with which their respective national legislation must comply.

31. As regards rule 4 (4), Colombian legislation does not distinguish between serious and minor offences, and the formulation of a rule that assumes the recognition of such a classification in national legislation is unacceptable. Furthermore, the design of the judicial structure of a hierarchical legal system makes it impossible to accept the requirement that competence to hear certain offences should be assigned to courts composed of several members.

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*Reply, in original Spanish, received on 13 January 1995.

32. As regards rule 7, Colombia considers that the proposed requirement that every judicial decision must be preceded by a hearing unjustifiably limits the State's scope in designing a policy of justice administration, since its wording is both restrictive and specific in regard to the possibility of exercising the right of denial and applying the principle of public trial. A rule such as that proposed would not be applicable to some legal systems where the written form is allowed for criminal proceedings.

33. As regards rule 9 (1), a stipulation to the effect that an accused may not be "induced to confess by means of ... reward or any other similar device" is unacceptable. Under some criminal justice systems, procedural inducements offered to persons who in one way or another cooperate with the justice authorities have proved to be an effective and extremely useful mechanism for the efficacious administration of justice.

34. Rule 9 (2) should be deleted. Since the present set of rules cannot refer to any one particular criminal justice system but must be geared to the application of penal law encompassing a large number of legal systems, it is not considered appropriate to specify the type of sanction to be imposed on the transgressor.

35. As regards rule 14 (2), in various countries, the principle referred to here is subject to limitations, such as secrecy regarding the identity of the judge or witnesses. It is important to take account of the need to safeguard the life and person of anyone who is under serious threat by reason of his dispensing justice in a lawsuit, or owing to his cooperation as a witness in shedding light on offences that are under investigation by the criminal justice authorities.

36. As regards rule 18, Colombia believes that this entire point cannot be regarded as a minimum rule of criminal law. Its content is far from that of a principle for universal application. In rule 19 (1), the expression "justified suspicions" should be replaced by "strong circumstantial evidence".

37. Colombia does not accept the principle contained in rule 20. Preventive detention may not be restricted to cases where there is a proven specific risk of escape by the defendant or of the destruction, disappearance or tampering with evidence, but to ensuring greater security concerning criminal responsibility. The general principle in rule 24 should recognize the admissibility of the inclusion, by individual States, of exceptions under their domestic laws.

38. Concerning the section on oral proceedings, its scope is confined to the principles governing the administration of justice within a prosecutorial procedural system, and for this reason those countries whose judicial structure is different would find no justification for accepting the requirements that this section lays down. On this basis, the section in question could be incorporated in the section entitled "suggestions for States".

39. The last sentence of rule 37 should be deleted. It should be borne in mind that, once a judicial ruling has become enforceable following the exhaustion of the admissible channels of appeal against it, no further challenge on the same facts and against the same ruling is permissible. If any such further challenge were possible, it would violate the principle of finality of judicial acts, which clearly would be inadvisable.

40. Concerning rules 44 and 45, Colombia is of the opinion that the draft minimum rules should not be concerned with the establishment of international courts, either to replace or to guide States in this sovereign function, or to serve as a channel for the imposition of obligations of other kinds, some retrospective in nature, which cannot be qualified as mere suggestions. Colombia doubts whether an issue such as the establishment of international courts should be discussed within this framework, which

is separate from the work of the International Law Commission and the Legal Committee of the General Assembly.

G. Cuba*

41. Cuba feels that more time should be spent preparing the rules, provided that this is the wish of the majority of countries.

42. Cuba does not see the need to establish an international court to protect the rights proclaimed in the minimum rules (rule 45). On the contrary, Cuba thinks that the wording should be the subject of more thorough study.

H. Cyprus**

43. The Government of the Republic of Cyprus agrees with and supports the preparation and adoption of United Nations minimum rules in the field covered by the draft minimum rules prepared by the expert commission.

I. Denmark***

44. In principle, the Danish authorities would favour that such rules be developed. The adoption of minimum rules may contribute to an enhancement of justice in connection with investigations into criminal offences and criminal proceedings.

45. The Danish authorities have not yet taken a final position on the proposed draft. However, at this stage the Danish authorities would like to state that the proposed minimum rules seem quite detailed. In future work, it might be more fruitful to aim at developing some general principles.

J. Ecuador****

46. The legislation and practice of Ecuador, in general, satisfies the requirements of the draft standards. Constitutionally, Ecuador has adopted the liberal model with the separation of powers designed to limit and balance power between the legislature, the executive and the judiciary. There is no militarization of justice in Ecuador, nor shortened forms of procedure.

47. As regards rule 4, the judicial office must be exercised without the slightest degree of suspicion or doubt as to the impartiality and independence of judges and magistrates. Multiperson courts are competent within the respective territorial district to hear the trial itself and pass judgement in all criminal cases which come before them, irrespective of the penalty prescribed for the offence concerned, except for cases of jurisdiction recognized by law and observing the provisions of the constitution. Misdemeanours, known in Ecuador as minor offences, are heard and decided by the so-called police judges, political procurators, national police and police governors.

48. With regard to rule 13, in Ecuador, the counsel for the defence is fully entitled to take part in the investigation stage and the jurisdictional stages of the penal process. Both in the pretrial proceedings and in the trial itself he or she may request evidence of all kinds to demonstrate the client's innocence. In Ecuador there is no right of appeal against a refusal to consider evidence, in other words, against the

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*Reply, in original Spanish, received on 3 December 1994.
**Reply, in original English, received on 31 March 1995.
***Reply, in original English, received on 19 January 1995.
****Reply, in original Spanish, received on 19 January 1995.

rejection of a judicial measure, as appeals in criminal matters are only allowed in cases expressly indicated in the Code of Penal Procedure.

49. As regards rule 18, neither the public prosecutor nor the national police are competent to order remand and preventive detention, the reason being that in Ecuador, the pretrial investigative stage is not the responsibility of the public prosecutor but of the so-called judicial police, which submits a report on its investigations to the criminal court judge so that the latter can draw up an indictment for the so-called officially investigable offences.

50. As regards rule 22, there are no criminal psychiatric hospitals in Ecuador. In such cases the mentally disturbed are in the hands of the psychiatrists. If the act has been committed by a person suffering from mental illness, and the judge in charge of the case considers that person would become insane unless he was admitted to a psychiatric hospital, he may not be released without the consent of the Procurator General's Office and a satisfactory report by two doctors appointed by the judge and attesting the complete restoration of the mental faculties of the person concerned.

51. As regards rule 37, in Ecuador there are no preliminary judicial proceedings. All precautionary measures, both real and personal, are arranged by the officiating judge in the pretrial proceedings. Where abuses of personal freedoms are concerned, an application of *habeas corpus* and *amparo* proceedings may be brought before the senior examining judge.

K. Finland*

52. The Government of Finland is in principle in favour of the development of minimum rules for the administration of criminal justice. However, such minimum rules would probably be of minor importance to those countries that are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as the proposed rules would cover more or less the same area as the provisions concerning criminal procedure in the said Convention. Those provisions are consistent with a significant number of judgements given by the European Court of Human Rights, and the Convention includes an effective system of legal protection for individuals, whereas the proposed minimum rules would not be legally binding.

53. Many of the proposed rules seem to be based on the common-law system which is alien to the legal system of Finland. This applies especially to prohibitions concerning the production and evaluation of evidence. From the point of view of Finland, the following rules, *inter alia*, seem to be especially problematic:

(a) As regards rule 2 (2), in Finland the police does not in terms of function come under the public prosecutor's office or the judiciary and courts, neither can such a change in the organization of authorities be foreseen in the near future;

(b) As regards rule 11 (2), according to Finnish law a defendant cannot be forced to have a legal counsel against his or her own will, while he or she has an unlimited right to have recourse to a legal counsel, if he or she so wishes;

(c) As regards rules 20 (1) and (2), according to Finnish law, a remand for trial (preventive detention) does not require that the sanction that may predictably be imposed is deprivation of freedom

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*Reply, in original English, received on 29 December 1994.

for more than two years. Finnish legislation does not establish maximum limits for the duration of remand for trial. Maximum limits for the duration of remand for trial are not required by the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(d) As regards rule 25 (1), the proposed absolute rule concerning the right to oral proceedings is not acceptable when it comes to appellate instances. An absolute right to oral proceedings before higher courts does not correspond to the practice of the European Court of Human Rights.

54. With reference to the above mentioned differences between the Finnish legal system and the proposed minimum rules, Finland would hardly be ready to accept and adopt the proposed rules as they now stand. The Finnish legal system in respect of criminal procedures is already in line with the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and there is no need at the moment to amend Finnish legislation. Despite these reservations, it is the view of the Government of Finland that there is merit in developing minimum rules for the administration of criminal justice, and Finland is ready to discuss this matter with a view to finding alternative formulations.

L. Germany*

55. The Government of Germany in principle would welcome the elaboration of standard minimum rules for the administration of criminal justice aiming *inter alia* at the introduction of obligatory oral proceedings which would contribute to reducing the duration of trials as well as of imprisonments on remand.

56. In the process of elaborating possible minimum standard rules, due consideration should also be given to human rights aspects. The Government of Germany would regard it as necessary at least to maintain the status quo recognized in other human rights standards and already obligatory in the criminal justice administration in a number of countries.

M. Ghana**

57. It is desirable that the United Nations minimum rules in the field covered by the draft be prepared and adopted for consideration by the Commission on Crime Prevention and Criminal Justice at its fourth session.

58. However, concerning rule 2 (2), the function of investigation in criminal proceedings should not be under the judiciary and the courts. The meaning of rule 4 (1) is not clear, since in Ghana prosecutions are conducted by public prosecutors and not by judges. Rule 4 (2) should be without prejudice to the right of review, which in Ghana may be exercised by the Supreme Court under article 133 of the constitution. Rule 31 (2) should not be so in all cases in Ghana. The burden of establishing the guilt of the accused person beyond reasonable doubt rests on the prosecution.

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*Reply, in original English, received on 27 March 1995.

**Reply, in original English, received on 27 February 1995.

N. Japan*

59. The main purpose of setting United Nations standards and norms is to provide guidelines on developing criminal justice systems in Member States, especially in developing countries and countries in transition. Although United Nations standards and norms have been developed in almost all the fields of criminal justice with considerable cost, we must admit that these standards and norms have not been fully used and applied in each country.

60. We think it necessary to study the reason why existing standards have not been fully used and applied in order to promote their full use and application. In accordance with Economic and Social Council resolution 1994/18 of 25 July 1994, the Secretary-General is currently carrying out surveys on the use and application of standards and norms in four fields. Based on the results of these surveys, we have to identify and analyse the obstacles to the use and application of existing standards and norms and, if necessary, to review them. Only after conducting such analysis and, if necessary, amendments to these standards and norms, the United Nations could consider embarking on new standard setting.

61. Japan has several comments on the draft rules. First, the criminal justice system in each country has its own features which have developed in conformity with the sociocultural tradition and the actual situation of crimes. Therefore, if the rules were too specific, it would probably be impossible to use and apply the rules to many countries.

62. Second, placing too much emphasis on the affirmation of rights of the accused, prisoners etc., despite the necessity to prevent crimes and to maintain a peaceful society, would be ineffective, risking to hamper the public sentiment of justice. We also fear that it would lead to the distrust, on the part of the public, of the United Nations international instruments. Thus, standards and norms in the field of criminal justice systems should be "minimum rules" in the context of providing the basic principles to be observed with regard to rights in criminal justice procedure. And then, it should be determined by each country how to realize such basic principles in practice, particularly, how to keep balance between the affirmation of rights and the necessity of maintaining social order, taking into account such elements as the actual situation of crimes and legal systems of criminal justice, including protection of victims.

63. Considering the above-mentioned points, the draft rules are too specific and detailed, without adequate consideration of different legal systems. Moreover, the rules seem to place one-sided emphasis on the aspect of affirmation of rights. Besides, elaboration of these new rules could be a needless duplication of past United Nations efforts vis-à-vis existing standards and norms. In conclusion, we regret to state that the Japanese Government is not in a position to support the elaboration of the draft rules.

O. Jordan**

64. The draft includes high principles and ideals in harmony with international covenants and divine laws which call for human dignity and respect for human nature at all times, even for an accused person or a person summoned before justice.

65. As regards rule 1 (2), the functions of indictment and prosecution are not incumbent upon private persons within Jordanian law. Jordan does not see any effectiveness in such a principle, due to the fact

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*Reply, in original English, received on 10 March 1995.

**Reply, in English and Arabic, received on 26 January 1995.

that where such functions were incumbent upon the State alone, security and stability would be further guaranteed.

66. Contrary to rule 22 (2) of the proposed draft, according to the Jordanian legal system, the family or the relatives of the defendant may neither agree nor disagree to the internment of the mentally deranged defendant in prison or another place.

67. Concerning the section on oral proceedings, the principles contained in the proposed draft are applicable in Jordan with regard to the public character of the hearings, except in certain cases where hearings may be closed; the submission of evidence directly to the court; and the hearing of witnesses before the court, except in certain specified cases where delivering of statements by witness before the public prosecutor may be sufficient, in the event of death, disability or necessary travel. The difference between the provisions of Jordanian law and the proposed draft is that in Jordan, questioning of witnesses may only be undertaken by the public prosecutor and the court, contrary to rule 29 (3) of the proposed draft.

68. Concerning the section on suggestions for States, we support the idea of possible access to international courts for citizens in the various countries, and the establishment of international courts to ensure the principles proclaimed in the draft and to translate them into reality, through concrete applications. However, we think that such an action might be in collision with the sovereignty of States and their will, which requires that their nationals should not have the possibility of bypassing the barriers of sovereignty in order to have access to international judicial bodies.

P. Kazakhstan*

69. It seems that the document should include such provisions as the following:

(a) The defender should have appointments with the accused without any limitations of their quantity and duration from the moment of admittance to take part at a case;

(b) Legal representatives, besides defenders, should be admitted to the cases of under-age children, as well as persons who due to their physical or mental defects are not able to carry out their right to defence without any assistance;

(c) The limitation of the secrecy of correspondence, telephone talks, post, telegraphs and other information, as well as of penetration into dwellings against the will of persons living there, may not take place at the prosecutor's discretion but only according to court decisions;

(d) The accused is not obliged to prove his or her innocence. Doubts as to a person's guilt are interpreted in favour of the accused;

(e) Evidence received through violating the law is to be deemed invalid and cannot be assumed as a basis of incrimination.

70. The adoption of an international legal instrument by the United Nations and its signature by Kazakhstan undoubtedly would promote the strengthening of human rights in criminal legal proceedings.

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*Reply, in original English, received on 17 January 1995.

Q. Kuwait*

71. Rule 12 (2) prohibits the examination of the defendant before he or she has been advised by counsel. Kuwait observes that this general and absolute prohibition would delay examination in the event of counsel failing to appear, consequently delaying the justice which the draft seeks to expedite.

72. Rule 20 (2) is inconsistent with considerations and justifications of preventive detention, which have no relation to the penalty established for the offence allegedly committed, but involve other considerations relating to the course of the investigation, the consequences of releasing the defendant, or the prevention of absconding by the defendant.

73. Rule 22 (2), as reflected by the agreement of the defendant to be interned, is contradictory to the nature of the defendant's rights, which are inalienable and may not be relinquished, and consequently are not subject to agreement or objection. Furthermore, cases of preventive detention are governed by the interests of the investigation, its course and the circumstances surrounding it, regardless of the agreement or objection of the defendant.

74. The text of rule 26 is self-contradictory. It is observed that the text, after having provided for the prohibition of the institution of oral proceedings against an absent defendant, in a general and absolute manner, made this prohibition specific to serious offences, in addition to not identifying crimes characterized as being serious. Furthermore, the general purport of prevention of this paragraph is that justice may be delayed by an action on the part of the defendant himself, which is rejected by general rules.

75. Section (I) contradicts customary practice in international human rights courts. The proposed international judiciary should not be an overseer of the internal courts of States or as a supreme court above such courts. Its competence should be limited to ascertaining whether human rights have been exposed to violation by one State or another. This is evident from the rulings of the European Court of Human Rights, which is a supervisory authority, established by virtue of the European Convention on Human Rights. Furthermore, recourse by individuals to international courts is still an object of disagreement. The prevailing thinking, up to the present time, is that individuals do not enjoy an international personality, even though international law addresses individuals in the domain of human rights.

R. Luxembourg**

76. The differences among Member States of the United Nations, their cultural and philosophical peculiarities are necessarily reflected in the penal procedure and the guarantees accorded to individuals which are subject to such procedure. While the establishment of minimum rules related to the administration of criminal justice within Member States could have a stimulating effect on the development of these procedures and guarantees, the juridical rules, conceived in a particular political, cultural and economic sphere, cannot be transferred as such to criminal justice systems existing in other States which have a different approach.

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*Reply, in original Arabic, received on 6 April 1995.

**Reply, in original French, received on 19 April 1995.

S. Namibia*

77. The provisions are drafted in such a way that in most cases they have little or no relevance in common-law, as opposed to civil-law, jurisdictions. An attempt should be made to use terms that can have practical meaning for common-law as well as civil-law jurisdictions.

78. Comments on the draft minimum rules are given below.

79. As regards rule 4, it is not the practice in almost all common-law jurisdictions to leave prosecutions to "independent judges". In any case, not all judicial officers who sit on the bench in most countries are referred to as judges. The term excludes magistrates who are the kingpins in criminal proceedings in most common-law countries, e.g. the Commonwealth countries. As regards rule 4 (4), the word "serious" is not defined, and in some central and southern African countries the theft of a single pig or goat, for instance, is a very serious offence for which the convicted person may be imprisoned for between 7 and 15 years, without the option of a fine. Rule 4 (4) should therefore be deleted.

80. With regard to rule 11, the State can only provide legal aid in both criminal and civil proceedings within the means of the State. That is how State-sponsored legal aid is granted in many countries, including Namibia. The last sentence under rule 11 (1), and rule 11 (2) should be deleted. They will not have practical meaning for poor countries. These two subrules will put undue financial strain on poor countries, and appear to glorify crime and criminal elements.

81. As regards rule 18, the provisions of rule 18 (3) are not in accord with acceptable practice in international law. Measures that are taken during declared states of emergency should be permissible under the constitution or any other written law. In view of the very purpose of emergency measures, it may be prejudicial to national security or public order if measures can only be taken with the approval of the courts. The whole purpose of such measures would be defeated thereby. Provision should rather be made which allows an aggrieved person to seek redress in the courts if he or she alleges a violation of his or her human rights and fundamental freedoms as a result of any emergency measures.

82. As regards rule 20, the idea of preventive detention should be totally deleted from rules which relate specifically to criminal law and crimes. Preventive detention, or administrative detention, as it is called in some countries, has purpose in a national security or public order situation not in a criminal situation. In any case, it is not a form of punishment, and therefore should not be used at all in criminal proceedings. In fact under international human rights law, preventive detention may only be used during declared states of emergency or when the country is at war. Where a mentally sick person is involved, such a person can only be detained in the execution of a court order.

83. Rule 44 is rather premature. Access of nationals to an international criminal court can only be justified if the State in question is a State party to a treaty establishing such an international criminal court, otherwise any such an arrangement will be illegal or unconstitutional.

T. New Zealand**

84. The principles and practice of New Zealand are in conformity with the draft rules. However, there are several unclear clauses in the draft, which make New Zealand unable to comment on them. With

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*Reply, in original English, received on 27 February 1995.

**Reply, in original English, received on 11 April 1995.

regard to rule 7, it is unclear what "previous hearing" means. It may be merely a reference to the natural justice rule of having a right to be heard.

85. New Zealand interprets "preventive detention" in section (E) as meaning remand in custody. There is a presumption that a defendant will be released on reasonable terms unless there is just cause for continued detention.

86. With regard to rule 43, the first and second parts of this sentence do not seem connected. New Zealand does not have a fund for reparation, but victims have access to free medical treatment and rehabilitation under existing legislation. It should be noted that the court may order that the offender pay reparation to the victim of an offence for emotional harm and property damage.

87. New Zealand is unable to comment on the proposal in rule 45, as the structure and purpose of such an international court is unknown. This proposal raises questions in respect of jurisdiction and differences in legal systems.

U. Oman*

88. The wording of rule 1 (2) is imprecise and should be amended so as to clarify its real and actual meaning without ambiguity or vagueness. Rule 1 (3) should expressly specify the authority to be entrusted with the function of indictment and the authority which has the right of control over it.

89. As regards rule 4, the basis for differentiation between serious offences and minor offences or misdemeanours is not clear.

90. Rule 11 (1) should be limited to the right of the accused to choose freely his or her counsel during the trial without any need to provide for that after conviction. As regards rule 13, the participation of a counsel in investigations is not logically acceptable, and may be contrary to the interests of the adversaries and to the purpose of the presence of the defence. The counsel should have only the right to attend investigations and not to take part in them. The text should be amended so as to give the defence the right to complain about the decisions of the investigator during investigations and not to appeal them.

91. As regards rule 22 (2), imprisonment is the function of the investigation and judicial authorities, as the circumstances of the case require, and there is no need to ask for the opinion of the accused or for the permission of his or her family. The right contained in rule 23 (2) is limited to the investigation authorities according to their discretion, without any need for the consent of the person concerned or the judicial authority for such intervention.

92. As regards rules 44 and 45, States have confidence in their national judiciary, as the judicial authority is one of the fundamental branches of authority on which the State is based. No foreign judiciary may have authority over a national judiciary, since this concerns the notion of sovereignty. Therefore, these two rules should be deleted.

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*Reply, in original English and Arabic, received on 9 February 1995.

V. Panama*

93. Panama supports the content of the draft minimum rules, but notes that, in paragraphs concerning the rights of the defendant, coercive measures and victims, other texts already adopted by the United Nations having a close connection with these subjects are not mentioned. It would seem to us desirable to take advantage of the texts that set forth minimum rules for the administration of criminal justice and to confirm, either in its preambular part or in the operative part, the undertakings assumed by the various Member States in regard to improving their systems of justice by incorporating the guidelines and principles already adopted at earlier international meetings and world congresses.

94. Panama believes that a set of basic instruments will exist which will give Member States an up-to-date, scientific system of rules, sufficiently broad for them to adapt to their internal law, and in this way, before the present century ends, will allow the most obvious deficiencies in criminal justice and correctional systems to be remedied.

W. Peru**

95. Peru agrees in general with the text of the draft minimum rules, and believes that their adoption would be one of the greatest advances in the efforts to achieve efficient administration of justice in States. Concerning the preamble to the draft, it would seem to be desirable to place greater emphasis on the standardization of legislation on criminal procedure and penal establishments in Member States.

96. In section (E) entitled "coercive measures", it would seem desirable to include an express rule to limit the application of coercive measures so as to avoid the creation of situations in which the defendant is prevented from defending himself or herself. It is necessary to include, as a procedural principle to be borne in mind in connection with the application of coercive measures, the "principle of security of the person as a social being", also called the "principle of humanity", which in turn derives from the constitutional principle, widely recognized in comparative law, of the dignity of the human person. This principle is important in the administration of justice. This suggestion could be included in rule 17.

97. Rule 32 should be moved to the section entitled "general principles of procedure", in as much as it is a general guiding principle in all criminal procedure.

98. In section (I) entitled "Suggestions for States", it would be desirable to recommend that States should organize ongoing training programmes for officials responsible for the administration of justice.

X. Syrian Arab Republic***

99. Some of the provisions under the title "general principles of procedure" are not in harmony with the law in force in the Syrian Arab Republic and the principles on which it is based, and do not take the various legal systems in the world into consideration. They do not take into account the cases where the function of indictment is incumbent upon judges.

100. With regard to section (c), "Rights of the defendant", rule 10 is not in harmony with the laws in force and the established legal interpretation. This principle has been addressed by legal interpretation

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*Reply, in original Spanish, received on 27 January 1995.

**Reply, in original Spanish, received on 3 January 1995.

***Reply, in original Arabic, received on 1 March 1995.

which rules that the invalidation of procedures to obtain evidence does not invalidate the evidence or the possibility of accepting it, because these are two separate questions, and because the crime affects the society, and the error committed in obtaining the evidence should not adversely affect the interests of the society.

101. With reference to "coercive measures", the purposes of preventive detention include also safeguarding the accused or calming down public opinion in the case of a crime which shocks the conscience of the general public. Restriction of liberty may be ordered by the investigating authority in the legal systems where the function of investigation, in flagrant crimes, is incumbent upon an investigating magistrate or a prosecuting judge. Making the measures of the public prosecutor subject to judicial authority is contrary to the principles in effect in the country. It does not take into account that the public prosecutor is a judge, and that the measures adopted by him can be stopped subject to consideration by a court or investigating magistrate.

102. Limiting the duration of detention to 72 hours is not in compliance with the law in force. We are not of the opinion that preventive detention should have an established maximum duration, and that it should be limited to offences for which the punishment exceeds two years. We do not, as well, support limiting the duration of preventive detention in a mental hospital for a person showing signs of insanity, and do not support making internment dependent on the agreement of the accused.

103. Concerning section (I) entitled "Suggestions for States", we do not support reference to international courts at a time when such courts have not been established and their jurisdiction has not been clarified and may infringe upon the jurisdiction of law courts.

Y. Switzerland*

104. Rule 1 (2) is not clear. As regards 1 (3), it would follow from rule 1 (1) that the function of indictment is an exclusive prerogative of the States. Within the meaning of the International Covenant on Civil and Political Rights, the function of indictment is the State activity exercised for purposes of bringing to justice the party who has committed a punishable act; it should not be confused with the power to trigger public action or support the charge, which under certain conditions may be considered as lying within the field of private initiative.

105. Concerning rule 7, respect for the right to be heard is fundamental in criminal procedure. However, one may not place on the same footing personal rights, which are of a constitutional nature, and procedural rights unless the content of the latter is stated. As regards 8 (2), the right to an interpreter ensues logically from the right to be heard. However, this is not a matter of assistance to the defendant on the same basis as the assistance of a lawyer, but rather an aid to justice intended to permit communication between the various participants in the proceedings.

106. Rule 10 is too rigid. The statements of the suspect are not regarded as evidence, in the strict sense, in all States. The real problem is that of evidence derived from statements illegally obtained. As regards 11 (1), the right of the defendant to undertake his or her own defence should not be absolute. Rule 11 (2) is too strict. It is hard to imagine compulsory defence whenever a person is liable only to a short term of deprivation of freedom, particularly if he or she is only indirectly liable thereto.

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*Reply, in original French, received on 17 January 1995.

107. The requirement of rule 19 (3) is excessive, since the period of detention is very short; furthermore, it is not democratic (or rather) social, since only well-to-do persons are in a position to retain the services of a lawyer of their choice at such short notice. Notification of the family during the period of detention should be subject to properly justified exceptions in the light of the risk of collusion.

108. As regards rule 20 (1), the risk of recidivism may in exceptional cases constitute grounds for detention. Rule 22 (2) does not lie within the field of criminal procedure. The drafting of rule 23 (1) is not good. Bodily intervention cannot be prohibited in principle. A distinction must be made between intervention in respect of the defendant, the victim and the third party. Rule 24 apparently does not apply to the detention premises.

109. As regards rule 45, it does not appear to us advisable to provide for a number of international courts all having cognizance of the same matter at the same time. That would be a source of legal insecurity.

Z. Turkey*

110. The proposed minimum rules contain the main principles of the international conventions and instruments relating to human rights and fundamental freedoms. The formulation of these principles in the form of specific rules will certainly contribute to their effective application, giving priority to the concept of the international rule of law, whilst at the same time serving as guidance for States, in particular those that have not yet adhered to the above-mentioned conventions.

111. On the other hand, Turkey would like to draw attention to an element aimed at ensuring the objectivity and impartiality of the experts whose decisions can considerably influence the judgement, namely the establishment of grounds in national legislation for non-participation and challenge for the same reasons as for the judges. Therefore, Turkey proposes to add this element to rule 30, under section (F), "Oral proceedings".

AA. United Kingdom of Great Britain and Northern Ireland**

112. Basically, the position of the United Kingdom is that it would be premature for the United Nations to embark on drawing up norms and standards in yet another area (i.e. minimum rules for the administration of criminal justice). Only in 1994, the Commission on Crime Prevention and Criminal Justice agreed to embark on an examination of norms and standards in four fields. This exercise has been started recently by the issuing of questionnaires to Member States by the Crime Prevention and Criminal Justice Branch. The concern of the United Kingdom is that a further initiative at the moment would dilute the quality of this work. And there is also the problem that the draft rules would overlap and potentially conflict with existing norms and standards. The United Kingdom does not think it desirable to prepare United Nations minimum rules in this field at this particular time.

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*Reply, in original English, received on 30 January 1995.

**Reply, in original English, received on 10 January 1995.

II. COMMENTS SUBMITTED BY THE INTERREGIONAL AND REGIONAL INSTITUTES

A. United Nations Interregional Crime and Justice Research Institute*

113. The concern of the United Nations Interregional Crime and Justice Research Institute (UNICRI) is that, in the form of the present draft, many provisions will not be appropriate to all legal systems, making the achievement of a consensus extremely difficult. The document needs considerable further refinement before it is submitted to a body such as the Commission on Crime Prevention and Criminal Justice. At the very least, should it be proceeded with, it should be reviewed by an expert group representing the various legal systems. Some of the major problems raised by the draft rules are indicated below.

114. Rule 1 (1) overlooks the fact that certain systems provide for private prosecution. The principle in rule 2(1) would appear to contradict the one in rule 2 (2) that the police and the officials carrying out the duties of investigation may in terms of function come under the judiciary and courts.

115. Rule 4 (1) would seem to overlook that in many countries findings of fact in criminal matters are left to a jury of lay persons, not judges. The second rule 4 would appear to overlook the case of the trial of serious offences by a single judge and jury. The definition of "qualified courts" is not clear.

116. As regards rule 18 (2), it is not clear which particular fundamental rights of the person and on what ground the police or prosecutors are entitled to infringe. Concerning rule 19 (1), it is not clear whether this rule would apply in relation to minor offences, nor whether it would refer to detention after having been charged or in order to discover whether the suspicions are indeed justified. This appears to offer a blanket right of detention, irrespective of such considerations as whether the suspect might commit another offence or interfere with the evidence.

117. The provisions dealing with the victim could cause difficulties within legal systems where there is no provision, for example, for the victim to have the right to a lawyer.

B. Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders**

118. First of all, the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders would like to stress that, in the field of crime prevention and criminal justice, approximately 30 standards and guidelines have been already adopted by the United Nations in the past. These existing standards already cover almost all aspects of the administration of criminal justice. In our opinion, what is now required for the United Nations to do is not the elaboration of new additional standards, but the promotion of the application of existing standards.

119. The Institute observes that many provisions in the proposed draft might be difficult to be accepted as they now stand by many States. The proposed draft should pay attention to the fact that the criminal justice system of each Member States reflects its own social and cultural backgrounds. The necessary consideration of such social and cultural basis of each country is always outlined in the efforts to

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*Reply, in original English, received on 18 November 1994.

**Reply, in original English, received on 27 February 1995.

promote the application of existing standards. To recognize and to respect diversity among Member States must be one of the most important doctrines under the Charter of the United Nations.

C. European Institute for Crime Prevention and Control, affiliated with the United Nations*

120. Administration of criminal justice is a wide domain with many different fields of interest. The draft covers a whole range of criminal justice professions and procedure at several levels and stages. It is an overly ambitious effort to try to create one single overall document covering this area which would be applicable in all Member States with different legal and socio-economic cultures. In addition, most of the questions dealt with in the present draft are already independently subject to more detailed standards and norms. It seems unnecessary to devote resources to composing any new umbrella rules which would only generally repeat some of the existing principles in the field.

121. Instead, Member States should be urged to give attention to the implementation of Council resolution 1994/18 on United Nations standards and norms in crime prevention and criminal justice, and to the further application and development of already existing instruments.

D. Arab Security Studies and Training Centre,** associated with the United Nations

122. The general principles of procedure should be global and not limited to one region or another. The draft missed some basic principles, especially "equality between parties" and "presumption of innocence", which must be mentioned as basic concepts.

123. Concerning the principles governing legal proceedings, collaboration between authorities is a democratic principle which now needs absolute reaffirmation. As regards rule 6, even if it is clear in the Anglo-Saxon system that the process begins with the arrest, it is difficult to say so in the Latin system.

124. As regards rule 14 (1), the problem is not before the court but before the investigation authority, especially in an inquisitorial system. The test of necessity must be applied in cases of negating recognizance as in the case of arrest and preventive detention.

125. Rule 44 suggests international courts to protect all sorts of rights, which is a controversial issue. ASSTC suggests as a step-by-step policy the establishment of regional international courts such as the European Court of Human Rights. Adding also "victims rights" after "fundamental rights of the citizen" will be more decisive in the protection approach. The same suggestion may be cited for rule 45, so that "international court" could be replaced by "regional criminal court" within the framework of an interregional organization such as the Arab League.

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*Reply, in original English, received on 15 December 1995.

**Reply, in original English, received on 5 December 1994.

E. International Centre for Criminal Law Reform and Criminal Justice Policy,* associated with the United Nations

126. The first concern of the International Centre for Criminal Law Reform and Criminal Justice Policy is placed on the general desirability of further promulgation of United Nations minimum rules in the area of crime prevention and criminal justice at a time when more productive efforts could and should be spent on the implementation of existing ones. The Centre does not discern a great urgency in the elaboration of new standards at this time.

127. If the draft minimum rules were adopted with minor variations, questions would be raised whether most developed countries could meet these standards, and whether the distance between the present state of affairs of developed countries and the standards of the draft minimum rules presents a desirable advancement. The general perception of the Centre is probably negative to both questions. If this is the perception regarding developed countries, developing countries may find any promulgation and implementation efforts regarding the draft minimum rules to be probably even less desirable.

128. As regards the apparent underlying preference for the adversarial approach, the Centre is concerned that the adversarial system is touted as the global solution to the violation of rights. It might be inappropriate to many countries and to some Aboriginal groups within various countries, including Canada.

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*Reply, in original English, received on 3 February 1995.